STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2003
v	No. 235607 Cass Circuit Court
BRIAN JAMES HAMMOND, Defendant-Appellant.	LC No. 0-10527-FC

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct (person under 13), MCL 750.520(b)(1)(a). He was sentenced as a second habitual offender, MCL 769.10, to twenty to thirty years' imprisonment. Defendant appeals as of right. We affirm.

I. Facts

In 1998, defendant lived with his girlfriend, Tami Bacca, her six-year-old daughter (the victim) and her infant son. During the months of June, July and August, they resided in a tent in Union City, Michigan on the property of an acquaintance of defendant. One day during that time period, Bacca took her son to the store, leaving the victim alone with defendant in the tent. The victim testified that on the day of the incident, she was wearing a bathing suit and laying in the tent next to defendant. She stated that defendant touched her between the legs and touched her private areas with his finger. Bacca testified that when she returned from the store, she observed defendant sticking his finger in the victim's vagina.

Detective Michael VanHorn of the Michigan State Police testified that he interviewed defendant and that defendant informed him that on the day of the incident he had been drinking and had some dirty thoughts. Defendant admitted to VanHorn that he took his leg and parted the victim's legs and rubbed the victim's belly and vaginal area. He told VanHorn that he climbed on top of the victim and thought about having sexual intercourse with her, and then changed his mind. Defendant revealed that he did put his finger on the victim's clitoris and that his finger was inside her vaginal lips along with material from her bathing suit.

Before trial, the trial court granted the people's motion to present evidence pursuant to MRE 404(b) of other incidents of sexual contact between defendant and the victim that occurred

while the family was living in Bristol, Indiana. In May 1999, the victim, defendant, Bacca and her son moved to Bristol. Bacca testified that she again observed defendant put his finger in the victim's vagina. She told defendant to stop, and he did. In September 1999, she observed defendant stick his penis in the victim's vagina. She also witnessed defendant instruct the victim to take off her underwear and put his finger in her vagina.

The victim testified that while living in Bristol, defendant laid on her belly and she was able to feel his privates on her privates. She stated that his privates were moving around and she saw white stuff come out. VanHorn testified that defendant admitted that when they lived in Bristol, he would have the victim close the curtains and undress so he could look at her and that he had touched the victim under her panties.

Bacca and defendant had a volatile relationship and Bacca left him and then returned to him four different times during their relationship. She testified that she never told anyone about defendant's sexual conduct with her daughter. Finally, in 2000, Bacca left defendant and went to a shelter in Bay City, Michigan. At the shelter, the victim told an employee about the sexual abuse. Furthermore, Bacca testified that she is currently incarcerated in Wisconsin and has been charged with sexual assault, incest, enticement, and failure to protect the victim. These charges stem from sexual abuse perpetrated against the victim by Bacca herself, and Bacca's failure to report defendant's abuse of the victim. Bacca's parental rights have been terminated and the victim is now in foster care.

In October 2000, pediatrician Dr. Laura Terpenning examined the victim. Terpenning testified that she was board certified in pediatrics and had specialized training in child sexual assault matters. Before she physically examined the victim, she obtained her history, including her history of sexual abuse, from the adults who brought her to the appointment. Her physical examination of the victim revealed a small cleft on the victim's hymen at about the 9 o'clock position. She testified that such a cleft in not normal in an eight year old and that it could be consistent with an adult putting a finger inside the child's vagina. She also stated that although the cleft is unusual and is often found in sexually abused children, it can also be found in children who have not been sexually abused. She could not say whether the cleft was caused by the abuse, or by some other accident, but did testify that the cleft was consistent with the type of abuse she had been told occurred.

William Schirado, a psychologist, testified that he had never met the victim, nor did he evaluate her, but he testified about child sexual assault cases in general. He stated that in his opinion, a child who was sexually assaulted by someone she knows, normally would not report it right away. He also noted that the mother's boyfriend is an individual who is very close to the natural family and that children are inclined to protect their families. Schirado testified that he had never seen a case where the mother was involved in the sexual assault and the child revealed the assault.

II. Analysis

A. Jury Instruction

Defendant first argues that the trial court committed error requiring reversal by failing to give jury instruction CJI2d 3.11(5) ("Deliberations and Verdict"). We disagree

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Although defendant did make a written request that the jury be given instruction CJI2d 3.11, when the instruction was not given, he failed to object. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29, *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130. Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149. A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *Carines, supra* at 763-764.

In the present case, the trial court did not give instruction CJI2d 3.11 entitled "Deliberations and Verdict;" it states:

> (5) In this case, there are several different crimes you may consider. When you discuss the case, you must consider the crime of [name principal charge] first. [If you all agree that defendant is guilty of that crime, you may stop your discussions and return your verdict.] If you believe that the Defendant is not guilty of [name principal charge] or if you cannot agree about that crime, you should consider the less serious crime of [name less serious charge]. [You decide how long to spend on (name principal charge) before discussing (name less serious charge). You can go back to (name principal charge) after discussing (name less serious charge) if you want to.]

Defendant relies on *People v Handley*, 415 Mich 356; 329 NW2d 710 (1982), to support his contention that this instruction should have been given. The *Handley* Court stated:

> [A] jury instructed after the day this opinion is released must be told to consider the principal charge first. It should then be instructed that if it fails to convict or acquit *or is unable to agree* whether to convict or acquit on that offense, it may then turn to lesser offenses. The correct instruction would be that after the jury has given consideration to the greater offense, it may turn to lesser offenses *either* if it finds the defendant not guilty of the greater offense *or* if it is unable to agree on whether the defendant is guilty or not guilty of the greater offense. *Id.* at 361.

Here, first the jury was instructed on the elements of first degree criminal sexual conduct. Then the trial court then stated: "you may also consider whether the defendant is guilty of the less serious crime known as second degree criminal sexual conduct." The trial court went on to list the elements of second degree criminal sexual conduct. The trial court then stated, "you may also consider whether the defendant is guilty of the less serious crime of attempted first degree criminal sexual conduct." The trial court then listed the elements of attempted first degree criminal sexual conduct. The trial court did not specifically instruct the jury about the order in which they should deliberate on these charges. However, the *Handley* Court went on to state:

> [I]n this case defense counsel expressed his satisfaction with the instructions as given. We are not convinced that this case is one in which we should deviate from the rule that instructional error should not be considered on appeal unless the issue has been preserved by an objection to the instruction in the trial court. Consequently, we believe the Court of Appeals erred in reversing the defendant's conviction on this ground. *Id.* at 360.

In the case at bar, just as in *Handley*, defense counsel expressed satisfaction with the instructions as given. Thus, defendant must show that the instructional omission affected his substantial rights. *Carines, supra* at 763-764. MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In the case at bar, the evidence against defendant was overwhelming. Defendant admitted to police that he had sexual contact with the victim; the victim herself testified that defendant had sexual contact with her; physical examination of the victim revealed possible sexual abuse; and the victim's mother testified that she witnessed the sexual abuse. Thus, we find that any error in the omission of the instruction on the order of deliberations did not result in the conviction of an innocent person or seriously affect the fairness, integrity or public reputation of the proceedings and we decline to grant relief on this matter. *Carines, supra* at 763-764.

B. Physician's Expert Testimony

Defendant next argues that the trial court erred in allowing the examining physician, Terpenning, to give her expert testimony that the victim had been sexually assaulted. We disagree.

We review a trial court's decision regarding the admissibility of expert witness testimony for an abuse of discretion. *People v Peebles,* 216 Mich App 661, 667; 550 NW2d 589 (1996).

In this case, defendant objected when Terpenning was asked, "Based on what you know about the history in this case and what you found out when you examined [victim's] vagina, what is your expert opinion about how that cleft came to be in her vagina?" This timely and specific objection preserved this issue for appeal. The trial court overruled this objection, relying on MRE 702, which states:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Terpenning then answered the question stating, "the cleft is consistent with the history of abuse that I was provided with." She further stated, "But, I do believe she was abused." Terpenning never testified as to who committed the abuse, or where the abuse occurred. She

merely used her pediatric expertise to explain to the jury that her medical examination of the victim revealed the possibility that the victim had been sexually abused.

The examining physician in a rape case is a proper witness as long as her testimony may assist the jury in their determination of the existence of either of two crucial elements of the offense charged, (1) penetration itself and (2) penetration against the will of the victim. *People v McGillen #2*, 392 Mich 278, 284; 220 NW2d 689 (1974). Here, Terpenning's testimony was proper where it assisted the jury in determining a crucial element of first degree criminal sexual conduct; that penetration occurred. In *McGillen #2*, our Supreme Court stated, "in no event is the doctor permitted to lend his expert opinion testimony as to the crucial issue whether or not the prosecutrix was actually raped at a specific time and place." *Id*. at 285. In the present case Terpenning merely assisted the jury by explaining that it is uncommon for children the age of the victim to have such a hymen cleft and by explaining that based on the information she received, she believed it was possible the child had been sexually abused. Terpenning never testified that defendant was the perpetrator in this case. In fact, the victim's mother testified that she was incarcerated at the time of the trial for role in the sexual abuse of the victim. Thus, the jury could have concluded that the victim's mother was the one who caused this abnormality in the victim's hymen.

Furthermore, Terpenning testified that there were other possible explanations for the cleft in the victim's hymen, even with the history of sexual assault that she had been provided. Ultimately, Terpenning's testimony assisted the jury in its understanding of the evidence and did not comment on the source of the victim's trauma or on the identity of any person connected with the history she was given or on the person who penetrated the victim. *People v LaPorte*, 103 Mich App 444, 453; 303 NW2d 222(1981). Accordingly, the trial court did not abuse its discretion when it admitted the expert opinion testimony of Terpenning.

C. Psychologist's Expert Testimony

Defendant next argues that the trial court committed error requiring reversal when it allowed the expert testimony of psychologist Schirado, that it was not unusual for an abused child to delay in disclosing abuse. We disagree.

To preserve most issues, a party must object below. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Objections to evidence must be timely, and specify the same ground for challenge as the party seeks to assert on appeal. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Defendant did not object to the testimony of Schirado; thus we review this issue for plain error affecting substantial rights. *Carines*, *supra* at 763-764.

In *People v Beckley*, 434 Mich 691 , 733 ; 456 NW2d 391 (1990), our Supreme Court held that evidence of behavioral patterns of sexually abused children is admissible "for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape." *Id.* at 710. In the present case, Schirado's testimony was offered for precisely that purpose. Defense counsel, in opening statements, challenged the credibility of the victim. Schirado testified only generally about typical behaviors in sexually abused children. In fact, Schirado could not testify as to the victim's truthfulness because he had never met the victim before.

Defendant's reliance on *People v Matlock*, 153 Mich App 171; 395 NW2d 274 (1986), is misplaced. In *Matlock*, the victim's treating counselor testified that she knew the victim and that the victim was not a liar, nor had she ever encountered a child who had lied about being sexually abused. *Id*. at 178-179. This Court found such testimony to be impermissible and grounds for reversal. *Id*. In the present case, Shirado never expressed a personal opinion about the victim's credibility. He merely explained to the jury that it is not uncommon for victims of sexual abuse at the hands of a family member to keep the abuse a secret. Therefore, pursuant to *Beckley*, the trial court properly admitted Shirado's testimony and defendant has failed to show plain error affecting substantial rights. *Carines*, *supra* at 763-764.

D. Sentence

Finally, defendant argues that the trial court abused its discretion in sentencing him to the maximum sentence within his sentencing guideline range. We disagree.

Generally, the imposition of a sentence is reviewed for an abuse of discretion, but if, as in the present case, the defendant failed to preserve the issue by objection at sentencing, review is limited to whether there was plain error which affected substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence imposed within an applicable judicial sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Nevertheless, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). A defendant must present unusual circumstances to the court before sentence is imposed, or he waives the issue for appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). In the present case, defendant presented no unusual circumstances at the imposition of his sentence that would preserve this issue for appeal.

Additionally, when a habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). In the case at bar, defendant has plainly demonstrated that he is unable to conform his conduct to the law; specifically, he continues to engage in criminal sexual conduct with young girls. Thus, the trial court's imposition of a sentence within the sentencing guidelines was clearly proportionate and proper.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder